IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-~~383~~ 838

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SUPREME COURT, U.S.

STATE OF MAINE, ET AL,

Petitioners

v.

JOLINE AND LIONEL THIBOUTOT, ET AL,

Respondents

MOTION TO FILE SUPPLEMENTAL BRIEF after argument

Respondents move this Court for an Order permitting them to file a Supplemental Brief for the reasons set forth in that brief.

June 3, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-~~303~~ 838

RECEIVED
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STATE OF MAINE, et. al.,

Petitioners

vs.

JOLINE AND LIONEL THIBOUTOT, et. al.,

Respondents.

* * * * * * * * * * * * *

On Writ of Certiorari to the
Supreme Judicial Court of the
State of Maine

SUPPLEMENTAL BRIEF OF RESPONDENTS

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June 3, 1980

INTRODUCTION

Because of the importance and particular relevance of recently enacted legislation, the Respondents submit this Supplemental Brief discussing the meaning of P.L. 96-247, signed by the President on May 23, 1980.

ARGUMENT

In adopting the Civil Rights of Institutionalized Persons Act, P.L. 96-247, a copy of which is attached,[1] Congress had before it 42 U.S.C. §1983 (R.S. 1979), and amended it by requiring that certain §1983 actions be continued for a period of time for the exhaustion of administrative remedies. P.L. 96-247, §7.[2] Although Section 7 of that Act will be codified

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1 This Act had been before the Congress for several years. It is derived from S.1393 of the 95th Congress and S.10 of the 96th Congress; in the House it is derived from H.R. 2439, H.R. 5791 and H.R. 9400 in the 95th Congress, and H.R. 10 in the 96th Congress. A copy of the bill reported by the Conference Committee which was enacted unchanged is attached.

2 This Section was viewed as an amendment to Section 1983, and was widely discussed throughout the legislative history. See, e.g., 125 Cong. Rec. H.3647-3648 (1979) (daily edition) (remarks of Rep. Kindness). Testimony of Peggy Weisberg, ACLU National Prison Project, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary at 48, February 14, 1979; Supplemental Statement of Irving R. Segal, American Bar Association, Hearings Before the Sub-Comm. on the Constitution of the Senate Comm. on the Judiciary on S. 1393, 95th Cong. 1st Sess., at 437 (1977).

elsewhere, Congress was dealing directly with Section 1983 and left intact the phrase "and laws." This amendment was made with the knowledge of the years of judicial interpretation that §1983 applied to deprivations of federal statutory rights generally. Perhaps even more significantly, Congress affirmatively indicated its belief and intention that this was the correct scope of Section 1983.[3] Throughout the legislative history of P.L. 96-247, it was made clear that it was intended and believed the "constitution or laws" language in sections 3, 4 and 5 of the Act meant the same as the "Constitution and laws" language of §1983, and that the scope of both included general statutory deprivations.[4]

A letter of Assistant Attorney General Days to House Subcommittee Chairman Kastenmeier states that the Civil Rights of Institutionalized Persons Act "should have a similar scope" to §1983, and cites Blue v. Craig, 505 F.2d 830 (4th Cir. 1974) as exemplifying some of the statutory deprivations within that scope.[5]

On the floor of the Senate, the Subcommittee Chairman and sponsor of the Act, Senator Bayh, together with Senator Javits, expressed the view that "when there is a violation of a Federal constitutional provision or a violation of a Federal statute by a State or local government, an injured institutionalized person can sue under...Section 1983."[6] With this explanation of §1983 by the sponsor of the Civil Rights of Institutionalized Persons Act which in part amends §1983, Congress enacted P.L. 96-247, which became law on May 23, 1980.

Clearly, Congress has adopted and incorporated into §1983 the interpretation given the statute in Blue v. Craig, supra, and the cases cited in the Respondents' Brief.

Respectfully submitted,

Robert E. Mittel
Hugh Calkins
Howard H. Dana, Jr.
Susan Calkins

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3 See, e.g., 126 Cong. Rec. S.1886 (Feb. 27, 1980) (daily edition) (remarks of Sen. Bayh); letter of Assistant Attorney General Drew S. Days III, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary on H.R. 2439 and H.R. 5791, 95th Cong. 1st Sess., ser. 28 at 326-327; J. J. Regan, When Nursing Home Patients Complain, 65 Geo. L. J. 691 (1977), Hearings on H.R. 2439 and H.R. 5791, ser. 28, supra, at 838.

4 See, e.g., Letter of Assistant Attorney General Days, supra, n.2; Letter of Philip Gassel, Legal Services for the Elderly, Hearings on H.R. 2439 and H.R. 5791, ser. 28, supra, n.2 at 475; Statement of C. Raymond Marvin, Nat'l. Ass'n. of Attorneys General, Id., ser. 28 at 89; 124 Cong. Rec. H.7477 (July 28, 1978) (daily edition) (remarks of Rep. Kastenmeier, sponsor); Id., at H.7486 (remarks of Rep. Butler); Id., at H.7487 (remarks of Rep. Railsback quoting a Justice Dept. opinion); H.R. Rep. 96-80 p.6 (1979); S. Rep. 95-1036, Appendix A p. 32 (1977).

5 Supra, n.3; This letter was discussed extensively in debate. See, e.g., Remarks of Reps. Wiggins and Butler, supra, n.4. Blue v. Craig is discussed in greater detail in Respondents' Brief at 25 and 28.

6 Supra, n.3.

STATE OF MAINE

CUMBERLAND, ss. June 3, 1980

I hereby certify that I have mailed a copy of the within Supplemental Brief of Respondents to James E. Smith, Esquire, as attorney for Petitioners, postage prepaid, first class mail.

Robert Edmond Mittel

96TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 96-897

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT

APRIL 22, 1980.—Ordered to be printed

Mr. KASTENMEIER, from the committee of conference submitted the following

CONFERENCE REPORT

[To accompany H.R. 10]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 10), to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Civil Rights of Institutionalized Persons Act".

SEC. 2. DEFINITIONS.

As used in this Act—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not

an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed "institutions" under this Act if—

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State;

(3) The term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term "legislative days" means any calendar day on which either House of Congress is in session.

SEC. 3. INITIATION OF ACTIONS.

(a) Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 2, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this Act to persons residing in or confined to an institution as defined in section 2(1)(B)(ii) only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

(c) Any complaint filed by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 4. CERTIFICATION REQUIREMENTS.

(a) At the time of the commencement of an action under section 2 the Attorney General shall certify to the court—

(1) that at least 49 calendar days previously he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of his intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under Section 3 of this Act—

(A) he has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which he believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) he has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is his opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that he believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 5. INTERVENTION IN ACTIONS.

(a)(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b)(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a)—

(A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) Any certification made by the Attorney General pursuant to this subsection shall be personally signed by him.

(c) *Any motion to intervene made by the Attorney General pursuant to this section shall be personally signed by him.*

(d) *In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.*

SEC. 6. PROHIBITION OF RETALIATION.

No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting.

SEC. 7. EXHAUSTION OF REMEDIES.

(a)(1) *Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.*

(2) *The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).*

(b)(1) *No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.*

(2) *The minimum standards shall provide—*

(A) *for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;*

(B) *specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;*

(C) *for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;*

(D) *for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and*

(E) *for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.*

(c)(1) *The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).*

(2) *The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).*

(d) *The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under sections 3 or 5 of this Act.*

SEC. 8. REPORT TO CONGRESS.

The Attorney General shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code—

(1) *a statement of the number, variety, and outcome of all actions instituted pursuant to this Act including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;*

(2) *a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;*

(3) *an analysis of the impact of actions instituted pursuant to this Act, including, when feasible, an estimate of the cost incurred by States and other political subdivisions;*

(4) *a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and*

(5) *the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.*

SEC. 9. PRIORITIES FOR USE OF FUNDS.

(a) *It is the intent of Congress that deplorable conditions in institutions covered by this Act amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this Act, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.*

SEC. 10. NOTICE TO FEDERAL DEPARTMENTS.

At the time of notification of the commencement of an investigation of an institution under section 3 or of the notification of an intention to file a motion to intervene under section 5 of this Act, and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney General shall notify the appropriate Secretary of his action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may proceed with an action under this Act if he is satisfied that such action is consistent with the policies and goals of the executive branch.

SEC. 11. DISCLAIMER—STANDARDS OF CARE.

Provisions of this Act shall not authorize promulgation of regulations defining standards of care.

SEC. 12. DISCLAIMER—PRIVATE LITIGATION.

The provisions of this Act shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this Act shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

And the Senate agree to the same.

ROBERT W. KASTENMEIER,
GEORGE E. DANIELSON,
ROMANO L. MAZZOLI,
HERBERT E. HARRIS II,
LAMAR GUDGER,
BOB CARR,
TOM RAILSBACK,
CARLOS J. MOORHEAD,
HAROLD S. SAWYER,
Managers on the Part of the House.

BIRCH BAYH,
HOWARD M. METZENBAUM,
HOWELL HEFLIN,
DENNIS DECONCINI,
ORRIN G. HATCH,
Managers on the Part of the Senate.